Supreme Court, U. S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM 1980

EILEEN BRADY, as next friend of the unborn child of Jane Doe, for and in behalf of said unborn child and all other unborn children similarly situated, as a class,

Petitioner,

v.

JANE DOE, a pseudonym,

Respondent.

On Writ of Certiorari to the Court of Civil Appeals of Texas for the Fourteenth Supreme Judicial District

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT

Eileen Brady, as Next Friend of the Unborn Child of Jane Doe (''said Unborn Child'') for and in behalf of said Unborn Child and all other Unborn Children similarly situated in Harris County, Texas, as a Class (''said Unborn Children''), petitions for a writ of certiorari to review the Judgment of the Court of Civil Appeals of Texas for the Fourteenth Supreme Judicial District at Houston, Texas, in this case.

QUESTIONS PRESENTED

1. Whether a particular Unborn Child, threatened and endangered with death by abortion, through a Texas Court-appointed Temporary Guardian and later through a Next Friend, has legal standing:

   a. to challenge the constitutionality and jurisdictional base of the Judgments and Decisions of this Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), and

   b. to raise and press his or her rights to life, liberty and property under, or protected by, the United States Constitution,

   in a quest to be spared from death by abortion;

2. Whether a particular Unborn Child, threatened and endangered with death by abortion, and all members of a designated class of similarly situated Unborn Children have rights to life, liberty and property under, or protected by, the United States Constitution which cannot be destroyed lawfully by abortion;

3. Whether an unborn child is a "person" under, or has a legal personality cognizable by, the U.S. Constitution;

4. Whether this Court should reconsider and overrule *Roe v. Wade* and *Doe v. Bolton* in light of certain:

   a. Factual matters presented by the instant case which were not before the Court in *Roe* and *Doe*;

   b. Legal matters presented by the instant case which were not before the Court in *Roe* and *Doe*; and

   c. Consequences or results of *Doe* and *Roe* which were not intended by the Court;

5. Whether the Judgments and Decisions of this Court in *Roe v. Wade* and *Doe v. Bolton* are void as violative of the United States Constitution;

6. Whether the Judgments and Decisions of this Court in *Roe v. Wade* and *Doe v. Bolton* are void as violative of Fundamental Principles of Personal Jurisdiction;

7. Whether said Unborn Child and said Unborn Children were protected against death by abortion by the revival, as a legal effect of *Roe v. Wade* (assuming *Roe* to be a lawful decision), of Texas criminal anti-abortion law of Article VI, "supreme law," status under the U.S. Constitution, such anti-abortion law having been carried forward from the laws of the Republic of Texas into the legal

system of the State of Texas by the 1845 Annexation Accord between the Republic and the United States;

8. Whether the Court of Civil Appeals violated the U.S. Constitution by relying on this Court's decision in *Roe v. Wade* in deciding the appeal without having first resolved the constitutional and jurisdictional challenges to *Roe v. Wade* before it and the substantial federal constitutional rights posture of said Unborn Child and said Unborn Children;

9. Whether the Court of Civil Appeals possessed the authority under the U.S. Constitution to pass upon (1) the constitutional and jurisdictional challenges to the Judgments and Decisions of the Federal Courts, including this Court, in *Roe* and *Doe*, and (2) the legal and constitutional status and rights posture of an unborn child post *Roe v. Wade*; and

10. Whether the Court of Appeals, during the rehearing stage of the appellate proceedings, violated the U.S. Constitution by overruling Petitioner's motion for appointment of a guardian ad litem for the class of Unborn Children in the case, after having been advised (1) that the Texas Probate Court revoked previously Petitioner's Temporary Guardianship (and hence court-appointed and District Court-admitted standing posture) *after* the Probate Judge was *sued* in a related case in Federal District Court, and (2) the Texas District Court requested the Attorneys to see the Probate Judge and *postponed* the scheduled hearing in the case until after this was done (during which contact the Probate Judge revoked the Temporary Guardianship Order).

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OPINIONS BELOW

The opinion of the Texas District Court (App. "A," pp. 1-5; S.r. 105-115) is not reported. The opinion of the Court of Civil Appeals (App. "B," pp. 1-2) is reported at 598 S.W. 2d 338.

JURISDICTION

The Judgment of the Court of Civil Appeals (App. "C," p. 1) was dated and entered on March 19, 1980. A timely Motion for Rehearing En Banc, as amended, was overruled by that Court on April 16, 1980 (*id.* at 2). A timely Application for a Writ of Error was refused by the Supreme Court of Texas with the notation, "[n]o reversible error," on July 30, 1980 (App. "D," p. 1).[1] A timely Motion for Rehearing was overruled by that Court on September 12, 1980 (*id.* at 2). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL, ANNEXATION ACCORD AND RULE PROVISIONS INVOLVED

These data, which are lengthy, are set forth in App. "E."

STATEMENT OF THE CASE

1. *The Temporary Guardianship*. On September 4, 1979, Probate Judge William Bear of Probate Court No. 1 of Harris County, Texas, appointed Mrs. Eileen Brady as Temporary Guardian of the person of the abortion-endangered Unborn Child of the Respondent, and empowered her to seek declaratory and injunctive relief for such Child in the Courts of Texas or the United States. Mrs. Brady duly qualified as such Temporary Guardian.

2. *The Petition Filed in State of Texas District Court*. On September 5, 1979, Mrs. Brady, as Temporary Guardian, filed suit in

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[1] The "no reversible error" (or "n.r.e.") notation means that the Supreme Court is "not satisfied" that the Court of Civil Appeals has stated the law correctly on all points, but that the Application for Writ of Error does not present error requiring reversal of the Judgment (Rule 483, Tex. R. Civ. Proc.). Where this occurs, as here, the Judgment of the Court of Civil Appeals does not become the Judgment of the Texas Supreme Court.

"S.F." refers to Statement of Facts, consisting of the hearing proceedings in the District Court. "Tr." refers to Transcript, consisting of documentary materials filed in the District Court. The Plaintiff's First Amended Original Petition in the District Court, which forms part of the Transcript, is referred to as "Petition."

Texas District Court, 129th Judicial District, for and in behalf of said Unborn Child and all other similarly situated Unborn Children in Harris County, Texas, as a Class, against Respondent, seeking declaratory relief for said Unborn Child and said Class and injunctive relief for said Unborn Child (Tr. 3-23).[2]

The Petition averred, in pertinent part:

a. That all members of the Plaintiff Class were "persons" or "living, human persons or beings" with "legal and juristic personalities" under the 5th Amendment to the U.S. Constitution (Petition, Para. Nos. 21, 68), and "people" with, or "beneficiaries" of, rights to life, liberty and property recognized, etc. under the 9th Amendment to the U.S. Constitution (*Id.* Nos. 39-40, 42; see No. 38);

b. That all members of Plaintiff Class have U.S. Constitutional rights which could not be destroyed lawfully by abortion, such rights per (1) certain existing Texas law of Article VI status by virtue of the 1845 Texas Annexation Treaty or Agreement between the Republic of Texas and the United States ("1845 Accord") [*Id.* Nos. 13-14, 48(1), 68]; (2) certain existing U.S. statutory law of Article VI status [*Id.* Nos. 15, 48 (2), 68]; (3) the 9th Amendment (*Id.* Nos. 16, 68); (4) certain Texas common, statutory and constitutional law, as guaranteed by the 10th Amendment [*Id.* Nos. 17-18, 48(4), 68]; and (5) certain Texas anti-abortion criminal law, revived as a legal effect of *Roe v. Wade* (without admitting the lawfulness of *Roe*), such law being of Article VI status because carried forward from the Republic of Texas into Texas Statehood by the 1845 Accord (*Id.* Nos. 51-61, 68);

c. That the Judgments and Decisions by the Three-Judge U.S. District Courts and this Court in *Roe v. Wade* and *Doe v. Bolton* are void because they were rendered or made in violation of various provisions of the U.S. Constitution, Fundamental Principles of Personal Jurisdiction and Rule 19,

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[2] Unborn Children whose premature removals, etc. from the wombs of their respective mothers are necessary, by reasoned medical advice from a duly licensed physician, in order to save or preserve the physical lives of their mothers are *not* part of the Plaintiff Class.

F.R. Civ. Proc., which Rule has the force of a U.S. statute and hence Article VI status (*Id.* Nos. 19-50, 74-78); and

d. That, assuming, without admitting, *Roe* to be a lawful decision, its effect would be to revive, as law in Texas, the criminal anti-abortion law which existed in Texas at the time of enactment, beginning in 1854, of those anti-abortion statutory provisions held unconstitutional in *Roe*, which prior anti-abortion law is of Constitutional status (Art. VI) because carried forward from the law of the Republic of Texas by said 1845 Accord, and that such law operates to protect all members of Plaintiff Class from death by abortion (*Id.* Nos. 51-61, 68).[3]

The petition sought a Judgment declaring the legal rights and status of Plaintiff Class, and temporary and permanent injunctive relief, restraining Respondent from securing an abortion.

3. *Subsequent Developments*. Shortly after the Petition was filed, the District Court denied Petitioner's Application for a Temporary Restraining Order (seeking to restrain Respondent from securing an abortion), and set the matter down for hearing at 9:30 a.m., September 12, 1979, on the request for a Temporary Injunction. The Court said that Petitioner had standing to sue. It requested the Attorneys for Petitioner to contact the American Civil Liberties Union ("A.C.L.U.") in order to determine whether it might wish to represent Respondent, and this request was carried out.

On September 10, 1979, one "Jane Woe," a pseudonym, represented at least in part by A.C.L.U. counsel, filed a class action suit in the U.S. District Court against Probate Judge Bear, a Class of Texas Judges and Eileen Brady. Among other things, the suit complained about the Temporary Guardianship which Judge Bear created on September 5, sought a judgment declaring certain temporary guardianship provisions of the *Texas Probate Code* to be unconstitutional and an injunction prohibiting any further application thereof.

[3] The federal constitutional, jurisdictional and related questions were argued by Petitioner to the District Court (S.F. 87-101), were raised as points of error on appeal and briefed and argued before the Court of Civil Appeals, and were raised as assignments of error in the Application for a Writ of Error filed in the Texas Supreme Court.

On September 11, Respondent joined this lawsuit as a Plaintiff for herself and a Class of similarly situated pregnant women.[4]

On September 12, 1979, at the time and place for hearing on the temporary injunction, the District Court, having knowledge that Probate Judge Bear desired to see the Attorneys, advised the Attorneys to contact Judge Bear. This was done and, after a "hearing" in chambers, Judge Bear revoked the Temporary Guardianship Order, and dismissed those proceedings with prejudice.

4. *The District Court Hearing*. The Original Petition thereafter was amended by removing the Temporary Guardianship posture of Eileen Brady and substituting her as Next Friend of said Unborn Child, etc. (S.F. 8-11). This was agreeable to the Court and the Respondent (S.F. 11, 111). At that time, Respondent filed in open Court a Motion to Dismiss and supporting Memorandum (See S.F. 53-54).

a. By way of stipulation between the parties, it was agreed that the Respondent was an actual person designated by the name "Jane Doe," a pseudonym; that she was an adult resident of Houston, Harris County, Texas; that she was about ten weeks' pregnant; that she was contemplating an abortion; and that, unless restrained by the lawsuit, she would terminate her pregnancy by abortion (S.F. 13).[5]

b. Eileen Brady assumed the office, capacity and trust of Next Friend of said Unborn Child (S.F. 17-18). She did this because she was "very concerned for the life of the child" (S.F. 22), and "was interested in trying to have the baby have a day in court***" (S.F. 28). She bore no "blood relationship" to Respondent, and was unaware of any Blood relationship to said Unborn Child other than the Respondent who could serve as Next Friend for said Child (S.F. 17, 18). She

[4] This suit was amended subsequently to claim $200,000.00 actual and punitive damages against Mrs. Brady, her Attorneys and others for alleged invasion of Respondent's "right of privacy," etc. *Woe v. Bear*, Civil Action No. H-79-1866 (S.D. Tex.)

[5] Respondent did not waive her objection of standing by Petitioner "to maintain" the lawsuit (S.F. 13), and the Court allowed Respondent a "running objection" to the relevancy of all of the testimony (S.F. 15).

had never met Respondent "face-to-face," although she had spoken to her over the telephone (S.F. 17). She did not know Respondent's name (S.F. 28).

c. Rebecca P. Schwanecke, M.D., a pediatrician and neonatologist in Houston, testified that human life begins at "fertilization," which is the union of the sperm with the woman's egg cell, and that "the medical community knows that life begins at the moment of fertilization because that's when the cells start multiplying and development progresses" (S.F. 46-47). The unborn child is a separate, biologic being, with an individual genetic makeup contributed half by the mother and half by the father, and with "its own unique individual makeup physically, anatomically, personality-wise and so forth" (S.F. 47-48). The unborn child has "its own blood grouping apart from the mother's blood group," and has "its own tissue which cannot be transplanted back to the mother" (*ibid.*).

At eight weeks gestational age, all of the major organs have formed (S.F. 36). At that time, the unborn child has a trunk, extremities, hands and rudimentary finger buds; a face with features; fingerprints; a heart which has been beating for "quite some time;" a circulatory system; a digestive system which is "starting to function;" and a brain which is "fully formed" (S.F. 36). "The brain is functioning so it definitely will have brain waves, the heart is beating so the heart can be detected with usual means***" (S.F. 37). In short, "everything is formed at eight weeks," the embryonic stage has ended, and "all the living human being has to do with continuing nurture in the environment of the womb is to grow bigger and just to make all his skills finer" (S.F. 37).

During this period, the "baby" swallows; reacts to the mother's "stress and distress" and to whatever is in the womb or to some extent to what is outside of the womb; has senses of taste, hearing and feeling; and could be hurt physically and feel pain (S.F. 37-38, 43). Such a child can feel what is happening in the abortion procedure applied during the first trimester (S.F. 42, 43), although it is not known the degree of pain which the child would suffer (S.F. 43). Abortions are performed "to nine months gestation" (S.F. 50).

5. *The Judgment and Decision of the District court.* After oral argument by each side, the Court expressed the following opinion (App. "A," pp. 1-2; S.F. 107-108):

- the "rights of unborn children" had not been litigated in an "adversary proceeding";
- such rights "were not represented in ROE versus WADE";
- the "rights of the unborn child" had been "subjugated to the rights of the mother";
- there has not been a "head-on-head confrontation" between the unborn child and the mother in an "adversary proceeding";
- that such a confrontation "is ultimately going to have to be resolved by the highest legal body in this land"; and
- that, if the Petitioner were correct, whatever "emotional repercussions" the Respondent might be having as a result of the proceedings have to be weighed "against the right to live of the unborn child."

The Court, however, did not rule that *Roe v. Wade* was void as violative of the U.S. Constitution, etc. Instead, it denied Petitioner's application for a temporary injunction and granted Respondent's motion to dismiss.

The Court made the following findings of fact and conclusions of law (App. "A," pp. 3-4; S.F. 109-112):

(1) That Eileen Brady had no "personal stake" in the outcome of the controversy (First Finding of Fact);

(2) That Mrs. Brady had "no justiciable interest or standing to raise, to bring this suit" (Second Finding of Fact);

(3) That Mrs. Brady, based on her testimony that she had never met Jane Doe and bore no blood relationship to her, was "without standing to maintain any next friendship to the unborn child of Jane Doe" (Third Finding of Fact); and

(4) Dismissed the cause on the ground of lack of standing "to maintain" the suit (First Conclusion of Law).

In order to avoid a remand in the event the Court was wrong on the standing question and to provide Petitioner with a "final appealable

order'' and a ''speedy appeal,'' the Court made the following ''additional findings'' (App. ''A,'' pp. 4-5; S.F. 114-115);

(5) That Petitioner had failed to prove that the ''proposed abortion'' by Respondent ''will be accomplished contrary to the medical judgment of her attending physician'' (Fourth Finding of Fact);

(6) That Respondent, who was in her first trimester of pregnancy, was entitled to obtain an abortion under *Roe v. Wade* (Second Conclusion of Law); and

(7) That said Unborn Child had ''no right as a person'' in that Court ''based on the law'' (*Roe v. Wade*) (Third Conclusion of Law).

ARGUMENT

This Court should grant the Writ of Certiorari *primarily* to reconsider and overrule *Roe v. Wade* and *Doe v. Bolton* because:

- Important factual and legal matters, presented by this case, were not before this court in *Roe* and *Doe*;
- *Roe* and *Doe* have brought about legal and other consequences unintended by the Court;
- *Roe* and *Doe* violated the U.S. Constitution in a number of particulars and, hence, they are void;
- *Roe* and *Doe* violated or permitted to be violated fundamental principles of personal jurisdiction (relative to unborn children and U.S. Citizen abortion ''survivor'' children) and, hence, they are void; and
- *Roe*, if a lawful decision, operated to revive, as law in Texas, the prior anti-abortion law, which law is of Article VI status because carried forward from the Republic of Texas into the laws of the State of Texas by the 1845 Accord, and this law protects unborn children in Texas from death by abortion;

and to reverse the Judgment of the Court of Civil Appeals which, in turn, relied upon *Roe* in deciding the appeal. *Roe* and *Doe* would have been decided in favor of the challenged statutes had the above matters been before this Court at those times.

Since *Roe* and *Doe* are constitutional type decisions, with broad-based impacts, this Court should be sensitive to calls for re-examination under appropriate circumstances. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Dissenting Opinion of Mr. Justice Brandeis). For a classic example where the Court has overruled an unconstitutional decision by it, see *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 16 Pet. 1 (1842).

I.

Important Factual and Legal Matters Were Not Before This Court in Roe and Doe

A. *Commencement of Human Life.* In *Roe*, this Court said that it would not decide the "difficult question" of when human life begins (410 U.S. at 159). Small wonder, since the *record* before the *Roe* Court was *silent* on this subject. In the instant case, however, there is uncontradicted scientific evidence in the record that human life begins at fertilization, a fact which is well understood in the medical community (S.F. 46, 47). Had this type of evidence been before the *Roe* Court, it is *unlikely* that the Court would have characterized an unborn child as "potential life" or the "potentiality of life." This would have presented an *altogether different* question to the Court, i.e., whether the State of Texas had a sufficient interest in protecting the *actual* lives of unborn children in the State from death by abortion.

B. *Essential Characteristics of Unborn Human Life.* The *record* before the *Roe* Court was *devoid* of essential scientific evidence on the characteristics of unborn human life. Therefore, there was *nothing* in the record on which to apply this Court's human "personhood" standards laid down in *Levy v. Louisiana*, 391 U.S. 68 (1968), or the "biological" test of "personhood" expressed generally in *Glona v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968).

In the instant case, the record shows that the unborn child is human, alive and has a distinct being or entityship (S.F. 46-48, 52). As such, the unborn child meets squarely the (1) "live human being" test of human "personhood" formulated in *Levy* and applied to a *post-humous child* in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164

(1972), and the (2) "biological" basis of human personhood expressed in *Glona*.

In addition, the record in the instant case shows that, at about 8 weeks of gestation, an unborn child has completed his or her organogenesis, has fingerprints, has a brain which functions and emits brain waves, has senses of taste, touch and hearing, and can feel what is happening during an abortion procedure (S.F. 36-41, 43). In short, such a child is clearly "one of us."[6]

C. *Revival of Texas Anti-Abortion Law as a Legal Effect of Roe v. Wade*. In *Roe v. Wade*, the Court held unconstitutional certain Texas anti-abortion statutory law first enacted in 1854. Assuming, without admitting, *Roe* to be a lawful decision, its legal effect operated to revive, under the doctrine of revival,[7] the *prior* anti-abortion law of Texas, which prior law is of Article VI status because carried forward from the laws of the Republic of Texas into the laws of the State of Texas by the 1845 Accord.

The Court never had a chance to consider this subject because, during the second oral argument in the case, Counsel for Henry Wade advised the Court—erroneously—that Texas had not legislated on the subject of abortion before 1854 and that, prior to 1854, it was legal to abort in the State (Tr. Oral Arg., *Roe v. Wade*, 10-11-72, pp. 67-68). However, the Republic of Texas adopted the English Common Law as the "rule of decision" for application "in all criminal cases" (Const. Rep. of Tex., 1836, Art. IV, § 13) and, by statute in 1836, provided that "all offenses known to the common law of England," as then understood and practiced, which were not provided for in that statute [and abortion or concealment of death (or birth) were not provided for

[6] In addition, evidence of the deleterious physical effect of induced abortion on the female reproductive function was not, of course, before the Court in *Roe*. This evidence—e.g., higher incidences of low-birth-weight infants, of premature births, of sterility, of spontaneous abortion—is beginning to show up.

[7] E.g., *People ex rel Farrington v. Mensching*, 79 N.E. 884, 889-890 (Ct. App. N.Y., 1907); *Harrison v. State*, 527 S.W. 2d 745, 748 (Crim. App. Tenn., 1975), *cert. denied*, see 527 S.W. 2d 745; *Goines v. Rockefeller*, 338 F. Supp. 1189, 1195 (S.D. W. Va., 1972); 16 *C.J.S.*, "Constitutional Law," § 101, pp. 469, 473. See *Patapsco Guano Co. v. N.C. Bd. of Agriculture*, 171 U.S. 345, 353 (1898); *Kohlsaat v. Murphy*, 96 U.S. 153 (1878).

therein], were to be "punished in the same manner as known to the said common law" (Act Punishing Crimes and Misdemeanors, Sec. 54, approved December 21, 1836; 1 Gam. *Laws of Texas* 1247, 1255). Thus, the English criminal law of abortion and concealment of the death of a newborn or stillborn child was adopted as law in the Republic in 1836.

These criminal law provisions formed part of the laws of the Republic which were carried forward into the law of the State of Texas by the 1845 Accord. (Tex. Const. of 1845, Art. Thirteenth, § 3; see *id.*, § 13). After Statehood, the Supreme Court of Texas declared that "[t]he common law in criminal cases, not provided for by legislative enactment, was introduced by the constitution of the republic, *and is still the law.*" *Grinder v. The State*, 2 Tex. 339, 340 (S.C. Tex., Dec. Term, 1847). (Emphasis added.)

Hence, the Texas anti-abortion law in existence *prior* to 1854 [9 Geo. IV, c. 31, § XIII (1828) and/or the English Common Law crime of abortion] is of Article VI status by virtue of the 1845 Accord between the Republic and the United States. This Accord is fully executed and cannot be changed. Only the Texas Legislature has the authority to change the laws of the Republic which were carried forward into Texas Statehood. In *United States v. Louisiana*, 363 U.S. 1, 37-38 (1960), this Court, in a different context, recognized this feature of Texas' annexation.

D. *Failure of this Court to Understand (1) the Common Law Offense of Abortion, (2) the Effect of the Reception or Adoption of the Common Law in the Original 13 Colonies and in Other States, and (3) the Purposes Behind State Anti-Abortion Statutes.* After its brief review in *Roe* of the English Common Law relative to abortion (410 U.S. at 132-136), the Court said that it "appear[ed] doubtful that abortion was even firmly established as a common-law crime even with respect to the destruction of a quick fetus" (410 U.S. at 136). *This was a most unfortunate historical-legal mistake because it (1) emasculated the effect of the reception or adoption of the English Common Law in the 13 Original Colonies and the States of the United States relative to the Common Law Offense of Abortion, (2) led to a misunderstanding of the purposes underlying the Anti-Abortion*

Statutes of the States, and (3) emasculated the significance of the rights of an unborn child under the Common (and other) Law, especially as such rights related to constitutional "personhood."

The short of the matter is that abortion was an offense from early common law times to the enactment of the first English anti-abortion statute in 1803, with human life, as understood by the ability to stir in the womb, protected by a criminal penalty;[8] that, during much of this period, a separate offense of concealment of death (or birth) existed in some form and applied to the formerly pregnant woman;[9] that the numerous rights of an unborn child, vested and contingent, at Common Law and in this country were furthered because of such life protection, thereby enhancing the "personhood" or legal status of the unborn child under the U.S. Constitution; that, at the time the 5th and 9th Amendments were adopted, the 13 Original States, with their reception of the English Common Law, recognized abortion as an offense; that, at the time the 14th Amendment was adopted, the unborn child enjoyed substantial life protection by state statutory or common law anti-abortion provisions; and that the purposes behind the anti-abortion statutes enacted by the States, which complemented such Common Law life protections, were designed to protect either the unborn child or the unborn child and the mother.[10]

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[8]The earliest reported abortion case in post-conquest England was in the year 1200. Other early cases appeared in the years 1202, 1203, 1206 and 1221. E.g., *Select Pleas of the Crown AD 1200-1225* (Selden Society, 1887), Case Nos. 82 (1200), 26 (1202) and 73 (1203), pp. 39, 11 and 32, respectively. An interesting conviction for abortion occurred in the Court of Star Chamber during the reign of Elizabeth I. *Star Chamber Cases* (Soule and Bugbee) (Boston, 1881), reprinted from the edition of 1630 or 1641, pp. 19-20. Abortion remained an offense up to the enactment of Lord Ellenborough's Act in 1803, where abortion was first made a statutory offense in England. See III Chitty, *A Practical Treatise on the Criminal Law* (London, 1816), pp. 798-801.

[9]The first statute, applicable only to the concealment of death of illegitimate children, was enacted in 1623 [21 James I, c. 27 (1623)]. In 1828, the offense was made applicable to any child [9 Geo. IV, c. 31, § XIV (1828)]. In *R. v. Colmer*, 9 Cox's C.L.C. 506 (1864), it was held that an unborn child not larger than a man's finger, but having the shape of a child, might be a child within the meaning of the concealment statute. It is a fact question for the jury. See 11 *Halsbury's Laws of England* (London, 1976) fn. 2 at p. 636.

[10]E.g., *State v. Ausplund*, 167 p. 1019, 1022-1023 (S.C. Ore., 1917); *State v.*

E. *The Constitutional "Personhood" of the Unborn Child.* The Court, in *Roe*, approached the constitutional "personhood" of the unborn child basically from the standpoints of the interest of the State of Texas in affording protection and of the wording of the Constitution as to use of the term "person." The Court, however, should have considered the following:

1. *Biologic Personhood.* As shown by the Statement, *supra*, human life commences at fertilization; and this life is both human and biologically distinct from the mother's life. Physical formation occurs quite rapidly. Petitioner submits respectfully that this Court simply *cannot* ignore uncontradicted scientific evidence on this score. The unborn child clearly is not "potential life" or the "potentiality of life." He or she *is* a live, human being.

One hundred and fifty years ago, and earlier, when much stock was place on movement or the ability to move by the unborn child as determinative of "life," a "potential life" characterization might have fit an unborn child who was not able to stir in the womb. While the view of the law then may have squared with the primitive science and biology of the times, late 20th century jurisprudence does not have such an excuse. Indeed, *Roe*, in this regard, is even *more primitive* than the Common Law of Blackstone's time, for Blackstone wrote that a natural "person" had the absolute right of personal security (life), and that "life" commenced when an infant "was able to stir in the mother's womb" (I Blackstone, *Commentaries on the Laws of England*, p. 129). *Roe* ascribes but "potential life" in the child up to birth!

Miller, 133 p. 878, 879 (S.C. Kan., 1913); *Edwards v. State*, 112 N.W. 611, 613 (S.C. Neb., 1907); *Dougherty v. People*, 1 Colo. 514, 523 (S.C. Colo., 1872); *Nash v. Meyer*, 31 P. 2d 273, 276 (S.C. Idaho, 1934); *Bowlan v. Lunsford*, 54 P. 2d 666, 668 (S.C. Okla., 1936); *State v. Tippie*, 105 N.E. 75, 77 (S.C. Ohio, 1913); *State v. Howard*, 32 Vt. 380, 399 (S.C. Vt., 1859); *State v. Cox*, 84 P. 2d 357, 361 (S.C. Wash., 1938). And from mid-twentieth century forward, this view of statutory purpose persisted. E.g., *State v. Siciliano, 121 A. 2d 490, 495 (S.C.N.J., 1956); Anderson v. Commonwealth*, 58 S.E. 2d 72, 76 (S.C. of App. Va., 1950). In *State v. Murphy*, 27 N.J.L. 112 (S.C.N.J., 1858), on which this Court relied as an example to show a different purpose, the court said that the unborn child was protected by the Common Law, that the mother was liable thereunder, and that the purpose of the statute under consideration was to cure a defect in the Common Law which that court discussed earlier in *State v. Cooper*, 22 N.J.L. 52 (S.C.N.J., 1849).

The Court should note that the mammalian ovum was discovered in 1827 and, with that, the understanding of human fertilization. Shortly thereafter, a medical work mentioned the human ovum in connection with a discussion of the human embryonic period, stated that "the foetus is alive from the very moment of conception" and said that "abortion is the destruction of a human being***." Ryan, *A Manual of Medical Jurisprudence* (Phil., 1832), pp. 127, 128, 131. In addition, it is interesting to note that, in but ten years after the discovery of the ovum, the English anti-abortion law of 1828 was replaced with a statutory provision which made abortion a felony *without regard* to whether the woman was "quick with child" [7 Wm. IV and 1 Vict., c. 85 (1837)].

2. *Personhood–Express Recognition*. The legal status or legal personality of an unborn child has been recognized expressly under English law [e.g., *Doe v. Clarke*, 126 E. Repts. 617, 618 (K.B., 1795)], Texas law [e.g., *Nelson v. Galveston, H. & S.A. Ry. Co.*, 14 S.W. 1021, 1023 (Com. App. Tex., 1890), *opinion adopted*, 14 S.W. at 1024 (S.C. Tex.)], other states' law [e.g., *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 257-258 (S.J. Ct. Mass., March Term, 1834)], and United States law [e.g., *Wagner v. Finch*, 413 F. 2d 267, 268-269 (C.A. 5, 1969)].

3. *Personhood–Implied Recognition*. The legal status or legal personality of an unborn child is recognized impliedly by virtue of the fact that the unborn child possesses a rich bundle of legally cognizable rights–vested and contingent–under tort, property and other law. These rights are enhanced because of the life protection rights, above. For example, in Texas, an unborn child has the right to be represented in judicial proceedings which affect the child [e.g., *Brantley v. Boone*, 34 S.W. 2d 409, 411 (Tex. Civ. App.–Eastland, 1931), no writ], a situation which obtained at Common Law [*Lutterel's Case*, referred to in *Hale v. Hale*, 24 E. Repts. 25 (Ch., 1692) (injunction to stay waste of property granted in favor of an unborn child)]; has the right to support [*Tex. Penal Code*, § 25.05(a); *Spicer v. State*, 179 S.W. 712, 713 (Tex. Crim. App., 1915)]; and is owed a duty of care, at any stage of gestation, under the prenatal tort injury doctrine [*Delgado v. Yandell*, 468 S.W. 2d 475 (Tex. Civ. App.–Fort Worth, 1971), err. ref. n.r.e., *holding approved*, 471 S.W. 2d 569 (S.C.

Tex., 1971)]. Numerous rights of unborn children derive from the Common or statutory law adopted by the Republic of Texas (e.g., representation, support, inheritance, taking under a will) and are of Article VI status because carried forward into Texas State law from the laws of the Republic by virtue of the 1845 Accord. See Tex. Const. of 1845, Art. Seventh, Sec. 20, and Art. Thirteenth, Sec. 3. Moreover, numerous types of rights and interests are recognized in, or conferred upon, unborn children under U.S. statutory law (e.g., the Social Security Act), discussed *infra*. These rights bespeak personhood or legal status, for as this Court put it, "Property does not have rights. People have rights." *Lynch v. H.F.C.*, 405 U.S. 538, 552 (1972).

4. *Personhood–Standards of this Court*. Except for *Dred Scott v. Sandford*, 60 U.S. 393 (1857), where this Court turned its collective back on members of the Black Race, this Court has applied legal status broadly and humanely up to *Roe v. Wade*. For example, a corporation, which is but an artificial or legal being, is a "person" entitled to the protections under the equal protection and due process clauses of the Constitution.

As for natural persons, this Court has made it clear that science or biology is the test for application. Thus, the "live, human being" test was expressed in *Levy*, *supra*, 391 U.S. at 70; and in *Glona*, *supra*, 391 U.S. 73, the Court said that the "biological," not the "legal," test was controlling on 14th Amendment personhood.

As shown above, the unborn child clearly is alive, human and has a distinct being. Biologically, the child is one of us. Hence, this Court's tests of personhood under the 14th Amendment, expressed above, clearly are met for the unborn child.

Moreover, the substantial legal rights posture of an unborn child under Texas and other law, above, equates to constitutional personhood or status. Surely a nonetity, or that which is denied recognition by the law, cannot have "rights." See *Lynch*, *supra*, 405 U.S. at 552. Yet unborn children have substantial legally cognizable rights, vested and contingent. Almost a century ago, this Court recognized that unborn children affected by a judicial proceeding were entitled to be represented, and, if they were not, the decree thus entered did not

conclude their rights. *McArthur v. Scott*, 113 U.S. 340, 391-392, 404 (1885).

Roe's examination of the U.S. Constitution for prenatal personhood application was most unrealistic. Aliens (including illegal aliens in this country) are not mentioned, nor are corporations; yet they are "persons."[11] The Preamble to the Constitution speaks, in part, to the "posterity" of this Nation, and the Constitution was preceded by the Declaration of Independence which recognized clearly that man was endowed with the unalienable right of life at creation, not birth. The Court should have focused on the child's legal posture, including legal rights and abortional protection, under English, Texas and U.S. law, and on its own personhood standards and applications.

F. *Constitutional Rights of Unborn Children*. Unborn Children in Texas (and in other States) have a rich variety of rights to life, liberty and property under the U.S. Constitution. These rights include the life right under the due process clauses of the 5th and 14th Amendments; and the life right, directly or as beneficiaries of life protections from the "people" or the States, under the 9th Amendment. At the time these Amendments were adopted, unborn children were protected against death by abortion under the English Common Law and/or State or Territorial statutory law. See e.g., Dissenting Opinion of Justice Rehnquist in *Roe*, 410 U.S. 171; I Swift, *A System of Laws of the State of Connecticut* (1795), pp. 177-178.

In Texas, the life right, together with a wide bundle of rights under adopted English law (e.g., representation, support, inheritance, taking under a will, execution reprieve, etc.) are of Article VI status because carried forward into the laws of the State of Texas by the 1845 Accord. Rights of unborn children under federal statutory law and the right to be heard as an indispensable party under Rule 19, F.R. Civ. P., which has the force of a U.S. statute, are also of Article VI status.

In addition, the rights of unborn children under *other* Texas law are of constitutional status under the reserved constitutional authority of

[11] This Court has "personified" a vessel, and permits certain types of suits to be brought (or defended) in the names of vessels. See *Sierra Club v. Morton*, 405 U.S. 727, fn. 2 at 742 (1972), and cases cited therein (Douglas, J., Dissenting Opinion).

the State as guaranteed by the 10th Amendment. This Court has recognized that the States have the authority to legislate, etc. on domestic or family matters and the authority to control the devolution and ownership of property at death. See e.g., *De Sylva v. Ballentine*, 351 U.S. 570, 580-582 (1956); *Labine v. Vincent*, 401 U.S. 532, 538-539 (1971).

G. The Constitutional Rights of the Affected Children Were Not Pressed to the Court in Roe. Henry Wade did not represent the affected children—U.S. Citizen Abortion "Survivor" Children or Unborn Children—because he did not undertake to do so, nor was he appointed guardian for them. "Parens patriae" authority in this country for those *non sui juris* is considered to reside in the "people" of a state or the state legislature or, where litigation is involved as to them, in the *equity court* itself. E.g., *Helton v. Crawley*, 41 N.W. 2d 60, 70-71 (S.C. Iowa, 1950); *Arnold v. Arnold*, 18 So. 2d 730, 734 (S.C. Ala., 1944). This harkens back to early English law, where such authority reposed in the King, and which was transferred later to his Chancellor. In *Roe*, Mr. Wade represented an executive or prosecutorial arm of government. The State of Texas was not even a party. As to this, Mrs. Sarah Weddington, an Attorney for Jane Roe, remarked to the District Court, "We goofed" (Record, *Roe v. Wade*, p. 109).

II.

Roe and Doe Have Produced Various Unintended Consequences

A. *Absoluteness of the Abortional "Right."* In *Roe*, this Court made it clear that a pregnant woman did not have an absolute right to terminate her pregnancy "at whatever time, in whatever way, and for whatever reason she alone chooses" (410 U.S. at 153), or that the "Constitution requires abortion on demand" (Burger, C.J., Concurring Opinion, 410 U.S. at 208). The opposite, as the Court may well take note, has occurred and continues. Well over one million unborn children, together with abortion "survivor" children, are killed by abortion in this Nation each year. The ultimate in Savagery, in the trappings of "liberty," stalks now our Beloved Land. In Texas, killing by abortion is "wide open" from conception to the commencement of childbirth. Even where a state proscribes abortion at

and after viability except where the mother's life or health is involved, the "health" meaning, expressed in *Doe v. Bolton*, is so broad as to make such proscription more form than substance.

B. *Effect of the Roe "Ethic" on U.S. Citizen Babies*. *Roe* and *Doe*, and the "ethic" which they have fostered, kill more than unborn children in this country. They kill or result in the death of U.S. Citizen Babies who "survive" abortion only to die in relatively short order. These children die primarily as a result of prematurity, abortional injury or lack of care. In this connection, the Court is referred respectfully to the August 7, 1980 Affidavits of Mrs. Dollie Maddy and Dr. Rebecca P. Schwanecke, filed in support of Petitioner's Motion for Rehearing in the Texas Supreme Court. In the Maddy Affidavit, an Infant Girl died after having been placed in a cold histology room and later in a storage area at a public hospital in Amarillo, Texas. In the Schwanecke Affidavit, an Infant Boy lived for about 3 days after his mother, allegedly during childbirth, was prescribed and took an abortifacient drug. Moreover, since "unsuccessful" abortions (i.e., those resulting in live births) can lead to civil liability for the abortionists, etc., "success" is encouraged legally—to the naked detriment of Infant U.S. Citizens.

C. *Internal Legal Chaos*. *Roe* and *Doe* have introduced legal chaos in Texas and other domestic U.S. Jurisdictions relative to the unborn child. Under Texas law, for example, an unborn child has legal rights of representation, support, protection against prenatal torts, inheritance, taking under a will, taking by gift, etc. An unborn child can take a wrongful death award relative to his deceased father (*Brantley v. Boone*, *supra*, 34 S.W. 2d 409). How can the "law" recognize a legal status and provide for or recognize legal rights in an unborn child when *Roe* and *Doe* purport to deny a legal existence to such a child? The states have clear reserved constitutional authority to operate in this sphere. See, e.g., *Labine v. Vincent*, *supra*, 401 U.S. at 538-539.

III.

Roe v. Wade and Doe v. Bolton are Unconstitutional

It is, of course, well established that if a court in the United States violates the U.S. Constitution, it loses jurisdiction to proceed to judgment, and any "judgment" which it might enter would be void.

E.g., *Johnson v. Zerbst*, 304 U.S. 458, 467-468 (1938); *Windsor v. McVeigh*, 93 U.S. 274, 277-284 (1876). In *Roe* and *Doe*, this Court violated the following provisions of the U.S. Constitution:

A. *Due Process Clause of the Fifth Amendment.*

1. *No Representation.* Neither Abortion "Survivors" nor abortion-endangered Unborn Children were represented before the Federal District Courts and this Court in *Roe* and *Doe* (except for a 10-day period in *Doe*). Yet each category of children was affected vitally by such proceedings. The "Survivors" are U.S. Citizens who were formerly Unborn Children intended for death by abortion. These Citizens were entitled clearly to be represented in the *very proceedings* which spelled death to them. Unborn children who, as shown above, have well defined legal statuses and substantial legally cognizable rights, vested and contingent, were also entitled to be represented in the proceedings which authorized their destruction. See, e.g., *McArthur v. Scott*, 113 U.S. at 404; *Brantley v. Boone*, *supra*, 34 S.W. 2d 409; *Lutterel's Case*, *supra*, see 24 E. Repts. 25.

2. *No Jurisdiction Over the Person.* Since Abortion "Survivors" and Unborn Children were not before the District Courts in *Roe* and *Doe* (except as noted above in the *Doe* Court), yet were affected by those proceedings in the most personal way possible, the Judgments and Decisions of those Courts were *void* as to them because they lacked personal jurisdiction over them, and, being void, they infected with *corresponding voidness* the review proceedings in this Court. See *Pennoyer v. Neff*, 95 U.S. 714 (1878); Rule 19, *supra*.

3. *Invidious Discrimination—Abortion "Survivor" v. Nonaborted Born Child.* By permitting the Abortion "Survivor" to be brought forth in an environment, etc. of death, this Court discriminated invidiously against him or her compared to the Nonaborted Born Child. Each such child is a U.S. Citizen, and each is entitled clearly to continue to live. One, however, has a full chance, while the other practically no chance. The "Survivor," for the most part, either *cannot* live or is *not permitted* to live.

4. *Invidious Discrimination—Unborn Child v. Nonaborted Born Child.* By permitting the destruction of the Unborn Child, this Court has discriminated invidiously against such Child compared to a

Nonaborted Born Child. Each has a legal status, and each has legally cognizable rights. A prematurely-born *7-month* "wanted" child has constitutional protections while an *8-month* unborn child is stripped of his or her legal rights and protections.

5. *Invidious Discrimination—Unborn Child v. a Corporation*. An *artificial* being, not mentioned in the Constitution, is recognized and has due process (and other) constitutional protections and rights. An Unborn Child, who is a *living* being, with substantial rights, is not recognized and is not afforded constitutional due process (and other) protections. The discrimination against the Unborn Child is invidious.

6. *Naked Deprivation of Rights*. All of the rights of Unborn Children, described briefly above, and all of the rights of U.S. Citizen Abortion "Survivors" have been and continue to be destroyed or endangered by abortion. This occurred when they were stripped of their life protections afforded by law and, in the case of Unborn Children, when their legal statuses were stripped from them, and in place thereof, the Court fashioned a new "liberty" to terminate a pregnancy. "Liberty" and "Property" are broad concepts, and "Life," of course, is the most basic right of all rights or interests. Courts sit to protect and adjust rights and interests, not provide for their destruction, particularly the life right. In *Roe* and *Doe*, this Court deprived *nakedly* the affected Children of their rights to life, liberty and property by *fiat*. See *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

7. *Deprivation of Rights Without a Trial*. *Roe* and *Doe* were decided by the District Courts by way of summary judgment. There were no trials. Henry Wade did not submit even an Affidavit for the affected Children. Yet there were substantial factual (as well as legal) matters which needed presentation under the traditional safeguards of a trial, such as the time when human life commences scientifically, the characteristics of an unborn child as related to legal "personhood," viability, whether live births can result from abortion procedures and at what point(s), the needs of such "survivors," etc. If important matters such as these can be ignored, supplied by "judicial notice" or otherwise "missed," what purpose does a trial serve? As an appellate court in *Roe*, this Court should have confined itself to the

case on the *record* before it, and not supplied missing factual or other matters.

8. *Violation of Procedural Due Process of Law*. The conduct of the Federal Courts, including this Court, under Subparagraphs 1, 2 and 7, above, constitute a rank violation of procedural due process of law standards as to said Unborn Children and said Abortion "Survivor" Children. See also, Rule 19, F.R. Civ. Proc.

B. *Violation of the 9th Amendment*. Abortion "Survivors" and Unborn Children threatened and endangered by abortion were deprived of their 9th Amendment life rights when this Court stripped them effectively of their legal protections and, in the case of Unborn Children, stripped them of their legal statuses. Moreover, they are *beneficiaries* of legal rights and recognitions by the people of Texas and other States (i.e., Unborn Children recognized in law and "Survivors" and Unborn Children recognized as having legal rights or legal rights are accorded to them). When the Federal District Courts and this Court in *Roe* and *Doe* refused to recognize and respect the life (and other) rights of such Children, the 9th Amendment was violated not only as to them, but as to the *other people* of Texas or the *State of Texas* who or which recognized or conferred such rights as *they* had the right clearly to do.

C. *Violation of the Division of Powers Concept and the 10th Amendment*. The States of Texas and Georgia possess the clear right to legislate, etc. on domestic matters, including the ownership and devolution of property in such States, including subjects such as the recognition, protection and conferral of rights upon Unborn Children within their borders. By refusing to recognize and respect the legitimate interests of Texas and Georgia in this sphere, the Court, as in *Swift v. Tyson*, 16 Pet. 1 (1842), denied power and authority belonging rightfully to these States. See *Erie R. v. Tompkins*, *supra*, 304 U.S. 64.

D. *Violation of the Supremacy Clause*. Unborn Children have substantial Common Law property and other rights, including protection from death by abortion, which were carried forward from the laws of the Republic of Texas into Texas State law by the 1845 Accord, were in effect in Texas when *Roe* was decided, and, hence,

were (and continue to be) of Article VI status. Moreover, Unborn Children in Texas (and elsewhere in the United States) have substantial property rights or benefits under numerous federal statutes which, of course, are of Article VI status since made pursuant to the Constitution.[12] Finally, affected Unborn Children were entitled to be before the District Courts in *Roe* and *Doe* as indispensable parties under Rule 19, F.R. Civ. Proc., which has the force of a U.S. statute (See 28 U.S.C. 2072.) and, hence, such rights are of Article VI status. In *Roe* and *Doe*, this Court turned its collective back on, or was unaware of, these substantial rights of Article VI stature.

E. *Violation of Article III*. This Court abused and violated its appellate jurisdiction under Article III of the Constitution, as regulated by U.S. statutory law, by (1) violating or allowing to be violated the Constitution and fundamental principles of jurisdiction, discussed above, and (2) legislating without constitutional authority to do so. The Court legislated when it purported to transform a deliberate act of human killing—a naked evil rooted deep in the legal and social heritage of this Nation—into a "fundamental" constitutional "right," and by presuming to instruct the States of Texas and Georgia what they could and could not do with respect to exercises of their reserved authorities under the U.S. Constitution. Simply and directly put, this Court has no constitutional jurisdiction whatsoever to do what it purported to do in *Roe*. The exercise of "raw judicial power," as Mr. Justice White put it in dissenting in *Roe* (410 U.S. at 222), has *no place* in the constitutional law of this Nation.

Against this background, the Court of Civil Appeals erred by relying upon *Roe* because that decision (as well as *Doe*), having violated the U.S. Constitution, is void.

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[12] E.g., Social Security Act, Subchapter II, 42 U.S.C. 401 *et seq.* (insurance benefits), and *Wagner v. Finch*, *supra*, 413 F. 2d at 268-269; Social Security Act, Subchapter IV, Part A, 42 U.S.C. 611 *et seq.* (support benefits under State A.F.D.C. Programs), and 45 C.F.R. 233.909(c)(2)(ii); Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* (workmen's compensation benefits), and *Texas Employers' Ins. Ass'n. v. Shea*, 410 F. 2d 56, 61, 62 (C.A. 5, 1969); Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674 (protection against tortious prenatal injury by U.S. Government), and *Sox v. United States*, 187 F. Supp. 465, 469, 470 (E.D.S.C., 1960).

IV.
Roe v. Wade and Doe v. Bolton Violated Fundamental Principles of Personal Jurisdiction

The Court of Civil Appeals erred in relying upon *Roe* because that case was decided without personal jurisdiction over the Infant Victims of abortion. The life protections of Unborn Children were removed and supplanted by a "liberty" to destroy them and, in the process, has led and continues to lead to the death of U.S. Citizen Abortion "Survivors."

Unborn Children were entitled clearly to be before the District Courts in *Roe* and *Doe*. E.g., *McArthur v. Scott*, *supra*, 113 U.S. at 391-392, 404; *Brantley v. Boone*, *supra*, 34 S.W. 2d at 411. So with Abortion "Survivors," who are U.S. Citizens. Since such Children were not before such Courts, their "Judgments" were *void* as to them, and this voidness infected the review proceedings in *this Court* with corresponding voidness. See, e.g., *Pennoyer v. Neff*, *supra*, 95 U.S. at 728; *Mallow v. Hinde*, 25 U.S. 193 (1827).

V.
Roe v. Wade, If a Lawful Decision, Revived Anti-Abortion Law in Texas of U.S. Constitutional Status Which Operates to Protect Unborn Children in the State From Abortion

If *Roe* is a lawful decision, it operated to revive, under the doctrine of revival, the prior anti-abortion law in Texas, which law is of Article VI status because carried forward from the Republic of Texas into the laws of the State of Texas by the 1845 Annexation Accord. See pp. 9-10, *supra*. This law operates to protect Unborn Children in Texas from death by abortion, and the Court of Civil Appeals erred in refusing to give effect to such revived law.

The Court is referred respectively to Appendix "E", pp. 15-17, for annexation and other materials here pertinent, including the applicable English anti-abortion statutory provision. See also page 11, *supra*, for the English offense of concealment of death or birth and the common law offense of abortion.

VI.
The Judgment and Decision of the Court of Civil Appeals Are Unconstitutional

The Court of Civil Appeals, in ruling that *Mrs. Brady* lacked standing, embraced *Roe v. Wade* unqualifiedly *despite* the facts that *Roe* was not applicable (different adversary proceeding, etc.), substantial constitutional and jurisdictional challenges were leveled against *Roe* and *Doe* by Petitioner, and that substantial constitutional status and rights postures were advanced for said Unborn Children affected by *Roe*, none of which the Court even answered.[13] This conduct violated the due process and equal protection provisions of the 14th Amendment, the 9th Amendment, the Division of Powers Concept as guaranteed by the 10th Amendment, and Article VI, for it permitted the naked destruction of legally cognizable rights to life, liberty and property of said Unborn Child (and others similarly situated), naked discrimination against such Child (and such children), direct violation of the criminal anti-abortion laws of Texas, etc. An unborn child possesses a clear legal status under the constitutional and other law of the United States, Texas and other States, and possesses a rich bundle of legal rights—vested and contingent—which the Court of Civil Appeals was duty bound to respect and protect.

The only way—constitutionally—that the Court could have relied upon *Roe* would have been for it to have considered the constitutional questions before it and decided them in favor of *Roe*. This it refused to do. Even the *Trial Court* recognized what this Court had done in *Roe* and all but concluded that it violated the Constitution.

It *appears* that the Court felt *powerless* to consider what this Court had done in *Roe*, that it had *no choice* but to accept *Roe* without question. This Court should make it *clear* that, in the discharge of

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[13] The Unborn Child, *not* Mrs. Brady, required standing and clearly possessed standing. The Child, possessed of a legal status or personhood, above, was in mortal danger of death.

The District Court's finding or ruling that Mrs. Brady could not be the next friend to said *Unborn Child* because she was not related to and had never met the *Respondent* is in flat error. An unborn child clearly can be represented by a next friend at Common Law and in Texas; and there is no requirement that the next friend be related to the

their duties under the Supremacy Clause of Article VI and under the 14th Amendment, state courts *do* have the constitutional authority to examine and pass upon *any* relevant and challenged decision of this (or any other) Court where presented properly in the particular cases before them. *If* this principle is not made clear, (1) the "rule of law" in this Nation will continue to suffer; (2) the principle that if a court violates the U.S. Constitution, it loses jurisdiction to proceed to judgment, and any judgment which it might render would be void will be one for application to all courts *except* this Court; and (3) a most insidious form of governmental tyranny—by lawmakers who answer *not* to the people of this Nation—will become ours with no practical opportunity to do anything about it.

VII.

The Court of Appeals Violated the U.S. Constitution By Refusing to Appoint a Guardian Ad Litem, Etc.

As shown by the Statement, *supra*, the Temporary Guardianship Order was revoked by Probate Judge Bear *after* he was *sued* in a related case in federal court; and the District Court, *beforehand*, requested the attorneys in the case to see Judge Bear and delayed the *scheduled* hearing (at a time when the Court admitted that Mrs. Brady had standing) until this could be done. [For further details, see Petitioner's (Appellant's) verified Motion to the Court En Banc for Appointment of Guardian ad Litem and Order of the Court of Civil Appeals overruling same, certified copies of which are being filed concurrently with this petition.] These actions, when parlayed together, constituted a rank violation of the due process clause of the 14th Amendment for reasons which are self-evident. It should be noted specifically that the District Court ruled *only* that Mrs. Brady

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child; E.g., *Anon.* (Case 265), 1 Atkyns 570 (Rolls Ct., 1737); *Lutterel's Case*, *supra*, see 24 E. Repts. 25; Macpherson, *A Treatise on the Law Relating to Infants* (Phil., 1843), pp. 235, 355. The District Court's finding that Petitioner failed to prove that Respondent's abortion would be performed contrary to the "medical judgment" of her "attending physician" missed the whole thrust of the case, including the imminent danger of death to the Unborn Child, and charted an almost legal impossibility (e.g., surmounting somehow the physician patient privilege, etc.).

lacked standing "to maintain," not to bring, the suit (App. "A," p. 4).

The Court of Civil Appeals should have corrected or cured this by appointing Mrs. Brady as Guardian ad Litem for the affected children or by granting rehearing in the case. This it refused to do, thereby allowing these violations to go uncorrected.[14]

CONCLUSION

For all of the reasons and authorities stated, it is submitted respectfully that petition for a writ of certiorari should be granted.

Richard W. Schmude
P.O. Box 674
Tomball, Texas 77375
(713) 656-4674
Attorney of Record for Petitioner

[14] Moreover, this action by Judge Bear enhanced—*unconstitutionally*—Respondent's subsequent claim in the federal suit for actual and punitive damages ($200,000.00) against Mrs. Brady, her Attorneys and others. This made it *appear* that Judge Bear acted improperly in performing his legal duty under the Texas Temporary Guardianship laws (*Tex. Probate Code*, § 131) when he created the Temporary Guardianship on September 4, 1979.

Appendix "A"

OPINION, FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT, SEPTEMBER 12, 1979

(S.F. 1, 105-115)

CAUSE NO. 79-39024

EILEEN BRADY, AS NEXT FRIEND OF THE UNBORN CHILD OF JANE DOE, FOR AND IN BEHALF OF SAID UNBORN CHILD AND ALL OTHER UNBORN CHILDREN SIMILAR SITUATED, AS A CLASS.	)(	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.		
JANE DOE, A PSEUDONYM	)(	215th JUDICIAL DISTRICT

HEARING ON TEMPORARY INJUNCTION

* * *

THE COURT: All right. I will agree with counsel for Plaintiff that I do not think that the rights of unborn children have been litigated in an adversary proceeding. I think they were certainly spoken to in ROE versus WADE, but in the sense that they were not represented in ROE versus WADE, and I do not think you can say that their rights had been determined in an adversary proceeding.

It was for that reason that I allowed Plaintiffs to put on their full case here today.

I think it's a question that is ultimately going to have to be resolved by the highest legal body in this land when the rights of the mother come face-to-face against the rights of the unborn child.

I think the rights of the unborn child have been subjected to the rights of the mother in ROE versus WADE and I don't think—or subjugated to the rights of the mother. I don't think there can be any dispute on that.

But I don't think there has been a head-on-head confrontation in an adversary proceeding. So for that reason I allowed you your day in Court.

On the other hand, I think it is a regrettable situation when a young woman who we fortunately have been able to keep unnamed so as to save her embarrassment is drug unwillingly into this proceeding and is caused to suffer whatever emotional repercussions that she may be going through. At the same time, if Petitioner is correct, you've got to weigh her emotional—the emotional repercussions to the mother against the right to live of the unborn child.

I took an oath when I assumed this office that I would follow the Constitution and laws of the United States and of this State. It would be an easy thing for me to avoid or attempt to avoid offending either side in this matter, and I could take the easy way out and simply rule that Mrs. Brady did not have standing to maintain this lawsuit.

However, I think I would be doing both parties an injustice because if I am wrong, then the Court of Civil Appeals who would merely reverse and remand the case to me.

So while I don't think I am called upon to take the judicial step that I'm going to take, I'm going to respond in full to the motion to dismiss filed by the Defendants herein.

As I understand the law of the State of Texas, there are three bases on which a plaintiff may maintain an action.

One is action of direct personal interest.

Under the authority of the United States Supreme Court in BAKER versus CARR, 82 Supreme Court Reporter 691, for a person to have a direct personal interest or to maintain an action of direct personal interest, they must have a personal stake in the outcome of the controversy.

So my first finding of fact—and here, if I mingle finding of facts with conclusion of law, I mean to be what it properly should—my first

finding is that this Plaintiff, Eileen Brady, has no personal stake in the outcome of the controversy.

Secondly, a person may maintain an action as Plaintiff where it involves public affairs. However, the Supreme Court of the State of Texas in the case of YETT, Y-E-T-T, versus COOK, 281 S.W. 837, a 1926 Supreme Court opinion, states, "We might well rest our opinion on this question on the construction of the charter alone, but there is still another fundamental reason why the realtor cannot maintain this action. It is a rule of universal acceptation that to entitle any person to maintain an action in court, it must be shown that he has a justiciable interest in the subject matter in litigation, either in his own right or in a representative capacity."

Going on, "Whatever may be the rule in other jurisdictions..." and I address that particularly to the point as made by Mr. Schmude, "...there can be no doubt that in Texas an action relating to electives or other matters of law enforcement not involving questions of taxation or unlawful expenditure of public funds, cannot be maintained by a realtor or plaintiff whose interest is only that of the public generally in the absence of a valid statute authorizing the suit."

I find as a matter of law or as fact that while this, undoubtedly, is a matter of interest to the public generally, that Mrs. Brady's position is no different from any other citizen, that there is no authorization by the Legislature to give her the right to file this suit, and that her only relief in this regard is to have the Attorney General of the State of Texas file a cause of action in behalf of the citizens of the State of Texas.

So I find that she has no justiciable interest or standing to raise, to bring this suit under the second general line of authorities for maintaining an action as Plaintiff.

Finally, we come to actions for benefit of another which is the third way you can maintain a suit.

Judge Bill Bear has rescinded his previous action of appointing Mrs. Brady as guardian of the unborn child.

She has, with the Court's permission and without objection from Defendants, amended her pleading to now come as next friend of the

unborn child of Jane Doe. And without citing the law, I find that the whole authority of case law is entirely against her.

I find this fact, based on her testimony, that she's never met Jane Doe, she bears no blood relationship to Jane Doe and, therefore, under the case law of the State of Texas, it is clear that she is without standing to maintain any next friendship to the unborn child of Jane Doe.

Therefore, I grant Defendant's motion to dismiss the cause of action on the grounds of lack of standing by Eileen Brady to maintain this suit.

If, however, I have erred in my findings and conclusions as to the standing of Eileen Brady to maintain this suit, in order to avoid the necessity of the Court of Civil Appeals remanding the case for further consideration by me, I will make the additional findings which I will concede are unnecessary if, in fact, I am correct, but if I am not as to the standing that Mrs. Brady has in this Court, of course, if I am incorrect, then I trust that these findings will get a final appealable order for the benefit of the Petitioners.

In making this ruling, let me read, although it has been attacked, I recognize it as the law of the land, let me read the remarks of Justice Blackmun in ROE versus WADE. It says, "We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experience, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

"In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

"Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection."

Lady and gentlemen, I sit here as a Court of law and Court of equity combined. I do not sit here in judgment of mores, ethnic's (sic)

religious attitudes or otherwise. I am obligated by the oath I took to follow the law.

I find as a matter of fact, conclusion of fact, that the Plaintiff has failed to prove that the proposed abortion by the Defendant, Jane Doe, will be accomplished contrary to the medical judgment of her attending physician.

I accordingly find, based on the stipulation, that she's in the first trimester of her pregnancy, that under the holding of ROE versus WADE, that she is entitled to obtain an abortion.

I further hold that, based on the authority of ROE versus WADE, which it states that an unborn child is not a person within the meaning of the 14th Amendment of the Constitution, that contrary to the cases cited by Mr. Schmude which give the unborn children the right to representation in certain instances for their financial rights, and they were all financial rights as I recorded the citations, that those cases are distinguishable from the present situation where you talk about right as a person as opposed to a punitive (sic) financial right.

And, accordingly, such unborn child has no right as a person in this court based on the law and certainly not based upon any religious or ethnical findings.

I am making the supplemental findings for the sole purpose for allowing the Plaintiffs their right to a speedy appeal.

The application for writ of injunction is denied as far as this Court is concerned. Jane Doe may obtain her abortion.

Will you draw an order on that?

Appendix "B"

Opinion of the Court of Civil Appeals of Texas

Affirmed, and Opinion filed March 19, 1980.

EILEEN BRADY, Appellant

No. B2307 vs.

JANE DOE, A PSEUDONYM, Appellee

Appeal from the 129th District Court
of Harris County

PER CURIAM

Eileen Brady, appellant, brought suit, as next friend of the unborn child of Jane Doe, seeking to enjoin Jane Doe, appellee, from having an abortion. At the temporary injunction hearing, it was stipulated that Jane Doe was an actual person; she was an adult; she resided in Houston, Harris County, Texas; she was then in approximately her tenth week of pregnancy; and she was contemplating an abortion and would, unless restrained, terminate her pregnancy by means of an abortion.

After a hearing, the trial court denied appellant's application for a temporary injunction and dismissed the cause with prejudice stating that Eileen Brady had no standing to bring the suit and that *Roe v. Wade*, 410 U.S. 113 (1973) was binding upon the court and precluded the relief sought. Brady has perfected this appeal.

TEX. R. CIV. P. 44 provides that "[m]inors...who have no legal guardian may sue and be represented by 'next friend'...." Eileen Brady sought to bring this suit as next friend of the unborn child of Jane Doe. However, when a suit is instituted by a next friend on behalf of a minor, the minor is the real party in interest. *Safeway Stores, Inc. of Texas v. Rutherford*, 111 S.W. 2d 688 (Tex. 1938). A minor is, necessarily, a person. The United States Supreme Court has ruled in *Roe v. Wade*, 410 U.S. at 159, that "...the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Thus, the unborn child of Jane Doe was not a minor. Eileen Brady had no standing under TEX. R. CIV. P. 44 since there was no minor to be the real party in interest. The trial court's dismissal of the cause based on a lack of standing is, therefore, affirmed.

Pursuant to the doctrine first enunciated in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court's holding in *Roe v. Wade*, is the law of the land. Thus, prior to the end of the first trimester, the abortion decision must be left to the woman and her physician.

All of appellant's points of error have been considered and are overruled.

Affiirmed.

Per Curiam

Judgment rendered, and Opinion filed March 19, 1980.

Panel consists of Associate Justices Coulson, Salazar and Junell.

THE STATE OF TEXAS)(
COUNTY OF HARRIS)(

I, THELMA MUELLER, Clerk of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, at Houston, do hereby certify that the preceding 2 pages contain a true and correct copy of Court's opinion rendered March 19, 1980 in Cause No. B2307, EILEEN BRADY, Appellant VS. JANE DOE, A PSEUDONYM, Appellee from Harris County, and now on file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of Said Court, at Houston, this the 17th day of October A.D. 1980.

THELMA MUELLER
Clerk

By: /s/ Claudine Parten
Chief Deputy

Appendix "C"

**Judgment of the Court of Civil Appeals
And Order of Said Court Overruling Petitioner's
(Appellant's) Motion and Amended Motion For Rehearing**

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A.D. 1979, present ASSOCIATE JUSTICES COULSON, SALAZAR and JUNELL.

In the cause
EILEEN BRADY — Appellant,
No. B2307

vs.

From — Harris County
Tr Ct # 79-39024
Opinion by Per Curiam

JANE DOE, A PSEUDONYM — Appellee,

the following judgment was entered on March 19, 1980.

"This cause, being an appeal from the judgment rendered by the court below and entered on October 11, 1979, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there is no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be affirmed in all things. It is further ordered that the appellant, Eileen Brady, and her surety, Lawyers Surety Corporation, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

I, THELMA MUELLER, Clerk of the Court of Civil Appeals for the 14th Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of judgment entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 2, Page 571

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 17th day of October A.D. 1980

THELMA MUELLER, Clerk

By /s/ Claudine Parten Deputy

Order Overruling Motion
And Amended Motion for Rehearing
[entered on April 16, 1980]

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A.D. 1979, present ASSOCIATE JUSTICES COULSON, SALAZAR and JUNELL.

In the cause
EILEEN BRADY Appellant ,
No. B2307

vs.

From Harris County
Tr Ct # 79-39024
Opinion by Per Curiam

JANE DOE, A PSEUDONYM Appellee ,

the following order was entered on April 16, 1980:

"It is ordered that appellant's motion and amended motion for rehearing be overruled."

I, THELMA MUELLER, Clerk of the Court of Civil Appeals for the 14th Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of order entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 2, Page 584.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 17th day of October A.D. 1980
THELMA MUELLER, Clerk

By /s/ Claudine Parten Deputy

Appendix "D"

Orders of the Supreme Court of Texas Refusing Petitioner's Application For a Writ of Error (n.r.e.) and Overruling Petitioner's Motion for Rehearing

In the Supreme Court of Texas

July 30, 1980

No. B-9451
EILEEN BRADY ET AL.)
) From Harris County,
vs.)
) Fourteenth District
JANE DOE, A PSEUDONYM)

Application of petitioners for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Eileen Brady et al., and Lawyers Surety Corporation,

pay all costs incurred on this application.

September 12, 1980

B-9451
EILEEN BRADY ET AL.)
) From Harris County,
vs.)
) Fourteenth District.
JANE DOE, A PSEUDONYM)

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 22nd day of September, 1980.

/s/ Garson R. Jackson
GARSON R. JACKSON, Clerk

Appendix "E"

Constitutional, Annexation Accord And Rule Provisions Involved

A. The U.S. Constitution provides, in pertinent part:

Article III, Sec. 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;***.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Article VI, Second Paragraph:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

5th Amendment:

[N]or shall any personbe deprived of life, liberty, or property, without due process of law;***

9th Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

10th Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

14th Amendment, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.*** [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. The Constitution of the Republic of Texas, adopted March 17, 1836, provided, in pertinent part [3 *Tex. Const.* (Vernon's) (1955), p. 528]:

Article IV, Sec. 13:

> The Congress shall, as early as practicable, introduce, by statute, the common law of England, with such modification as our circumstances, in their judgment, may require; and in all criminal cases the common law shall be the rule of decision.

C. The 1845 Accord of Annexation between the Republic of Texas and the United States embraced the following:

1. Joint Resolution of the U.S. Congress, approved March 1, 1845 (5 U.S. Stat. 797):

> ***That Congress doth consent that the territory properly included within, and rightly belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.
>
> 2. *And be it further resolved*, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First*. Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the Constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six.

2. Act Punishing Crimes and Misdemeanors, approved December 21, 1836 (1 Gam. *Laws of Texas* 1247, 1255):

> All offenses known to the common law of England as now understood and practiced, which are not provided for in this act, shall be punished in the same manner as known to the said common law. (Sec. 54)

3. Act To adopt the Common Law of England, etc. (2 Gam. *Laws of Texas* 177-178):

> That the Common Law of England (so far as it is not inconsistent with the Constitution or the Acts of Congress now in force) shall, together with such acts be the rule of decision in this Republic, and shall continue in full force until altered or repealed by Congress (Sec. 1) (now covered by Art. 1, *V.T.C.S.*)

4. An Act for consolidating and amending the Statutes in *England* relative to Offenses against the Person [9 Geo. IV, c. 31 (1828)]:

> XIII. And be it enacted, That if any Person, with Intent to procure the Miscarriage of any Woman then being quick with Child unlawfully and maliciously shall administer to her, or cause to be taken by her, any Poison or other noxious Thing, or shall use any Instrument or other Means whatever with the like Intent, every such Offender, and every Person counselling, aiding, or abetting such Offender, shall be guilty of Felony, and being convicted thereof, shall suffer Death as a Felon; and if any Person, with Intent to procure the Miscarriage of any Woman not being, or not being proved to be, then quick with Child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any Medicine or other Thing, or shall use any Instrument or other Means whatever with the like Intent, every such Offender, and every Person counselling, aiding, or abetting such Offender, shall be guilty of Felony, and being convicted thereof, shall be liable, at the Discretion of the Court, to be transported beyond the Seas for any Term not exceeding Fourteen Years nor less than Seven Years, or to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for any Term not exceeding Three Years, and if a Male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such Imprisonment.

5. Texas Constitution of 1845 (2 Gam. *Laws of Texas* 1293-1294, 1299, 1301):

Article Seventh:

Sec. 20. The rights of property and of action, which have been acquired under the Constitution and laws of the Republic of Texas, shall not be divested; nor shall any rights or actions which have been divested, barred, or declared null and void by the Constitution and laws of the Republic of Texas, be re-invested, revived, or re-instated, by this Constitution; but the same shall remain precisely in the situation which they were before adoption of this Constitution.

Article Thirteenth:

[Sec. 3.] All laws and parts of laws now in force in the Republic of Texas, which are not repugnant to the Constitutionof the United States, the joint resolutions for annexing Texas to the United States, or to the provisions of this Constitution, shall continue and remain in force, as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof.

Sec. 13. The ordinance passed by the Convention on the fourth day of July, assenting to the overtures for the annexation of Texas to the United States, shall be attached to this Constitution and form a part of the same.

D. Rule 19, F.R. Civ. Proc., provides, in pertinent part:

(a) *Persons to be Joined if Feasible*. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.